No. 82-1771

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERTO ANTONIO LEON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CRIMINAL JUSTICE LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence obtained in the good faith, reasonable belief that the search and seizure at issue did not violate the Fourth Amendment.

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INTEREST OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

The Criminal Justice Legal Foundation is a non-profit law firm organized to advance the public's interest in a system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

The exclusionary rule has come to symbolize to the public mind the plethora of technical rules of procedure promulgated to provide full respect to the rights of defendants without regard to the legitimate countervailing rights of victims and society. As a non-governmental advocate of these rights of the citizenry, the Criminal Justice Legal Foundation has a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The single point we intend to argue pertains to the weight of the interest represented by the petitioner in this matter. It is our contention that the *fundamental* obligation of a republican form of government is to provide for the safety and security of its citizens in the enjoyment of their lives and the fruits of their labors.

This obligation of government has been asserted since the early 17th century in this country. It continues to be invoked to our own day in the various states' constitutions.

In the 10th Amendment, the Federal government recognized the retention by the states of this obligation, which flows from possession of the reserved police powers. By agreeing to respect the reservation of these police powers to the states, the Federal government assumed an obligation to neither unnecessarily, nor unreasonably, hinder their exercise. The present "blanket" exclusionary rule violates this obligation.

Since the states' interest in the inclusion of evidence is incident to the states' reserved powers, the costs of the rule are subsumed within the same aura of Constitutional concern as is the exclusionary rule. Both interests in this controversy tend toward the furtherance of Constitutionally recognized values. Once this is realized, the costs of the present rule become prohibitive. Thus a good faith exception is mandated.

ARGUMENT

I

THE FUNDAMENTAL OBLIGATION OF THE AMERICAN POLITICAL SYSTEM IS TO PROVIDE THEIR CITIZENS WITH SECURITY FOR, AND PROTECTION OF, THEIR LIBERTIES

The Petition for Certiorari filed by the United States in this matter (hereinafter, *Petition*) indicates that the arguments it intends to submit in its brief will track those made by that party as amicus curiae in *Illinois v. Gates* ..... U.S.

..... 76L Ed 2nd 527 (1983). *Petition*, 9. That argument posits that deterrence is the sole justification for the exclusionary rule, hence the rule must be analyzed in terms of benefits gained for costs paid. It proceeds to contend that when a police officer acts in good faith reliance on a search warrant, or the state of the law regarding warrantless searches, that the deterrent effect of the rule is at best minimal, perhaps even counter-productive. There is little we can add to the United States' persuasive and compelling presentation of this argument.

However, the cost-benefit analysis urged by the United States and utilized in various decisions over the years (e.g. *United States v. Calandra* 414 US 338, 351-352 (1974); *United States v. Ceccolini* 435 US 268, 280 (1978)) would profit by explication of the source and nature of the rights and interests forwarded by the United States.

The exclusionary rule itself is not one of constitutional necessity, but is instead a judicially imposed remedy meant to further the substantive content of the 4th Amendment. *Illinois v. Gates supra* at 538-539, (maj. opn.) 558-561 (White, J. conc.); *Calandra, supra* at 348; *Desist v. United States* 394 US 244, 254 n. 24 (1969). Hence it is neither purely constitutional nor purely non-constitutional in nature: it is instead a hybrid of constitution and social policy, or if you will, quasi-constitutional.

The interest of the state lies in introducing relevant, reliable, probative evidence of criminal wrongdoing, in fulfillment of the duties imposed through possession of the police powers.[1] These police powers do not take precedence

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[1]Because *Mapp v. Ohio* 367 US 643 (1961) imposes the Federal Exclusionary Rule upon the states, who carry on the overwhelming volume of police business in this nation, our concern, and this argument, is addressed to the effect of this imposition. Our approach is therefore from the vantage point of the states and their citizens, relevant here because of *Mapp*. We see no indication of a revival of *Wolf v. Colorado* 338 US 25 (1949). Were such an event to occur our argument would be either moot, or would await indications of the exact contents of such a bifurcated rule, as applied to the states.

over the 4th Amendment, as incorporated in the 14th. Nevertheless, the fundamental and basic obligation of the states to provide such protection, if recognized by the Constitution, colors the states' interest with shades of the same Constitutional color as the exclusionary rule. In such a case, exclusion stands proximate to one Constitutional guarantee, while inclusion of evidence supports the substantive content of another Constitutionally recognized fundamental value.

A. This Fundamental Interest and Obligation Is Deeply Rooted In Anglo American Legal and Political Theory

The antecedents of American political thought at the time of the Revolution can be traced back at least as far as classical Greece and Rome. B. Bailyn; *The Ideological Origins of the American Revolution* (Harv. Univ. Press 1967), 23-26 (hereinafter, *Bailyn*); G. Wood, *The Creation of the American Republic, 1776-1787* (Norton Library 1972), 6-7, 48-53 (hereinafter, *Wood*); B. Brown, *Great American Political Thinkers, Vol. 1* (Avon Books 1983), 3 (hereinafter, *Brown*). However, one event, and one person, overshadowed all others in the formulation of our constitutional theory—The Glorious Revolution of 1688, and its amendment of the British Constitution, and its principal apologist John Locke. See, e.g., James Otis, The Rights of the British Colonies Asserted and Proved (1764), John Adams, Thoughts on Government (1776), in *Brown, supra* 79, 168-169; see also *Wood, supra* 8-12, 20-21, 601-602; *Bailyn, supra* 26-30, 78-81, 123-132; B. Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (Ox. Univ. Press 1977) 1-2, (hereinafter, *Schwartz*).[2] To view the Revolution of 1776-1789 in iso-

[2]*Schwartz* characterizes the American Revolution as a replay of the Glorious Revolution, "so signally commemorated in Locke's writings." While England moved into the 19th century, America dawdled in the 17th, in order to fully attain its share of the rights wrested from government in Stuart England. *Id.* at 31-32.

lation from these influences would be akin to analyzing the Russian Revolution of 1917 without benefit of reference to Marx and Engels.

> "It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment text and fought for the legal recognition of natural rights. . . . They did so; but they were not alone. The ideas and writings of the leading secular thinkers of the Enlightenment . . . were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contracts." *Bailyn, supra* at 27.

The members of this Court are not strangers to Locke's theory of government contained in his work, *The Second Treatise of Government.* The fundamental law of nature is the peace and preservation of mankind. In a state of nature each person possesses the executive power of this law, since without enforcement the law itself would be in vain. J. Locke, *The Second Treatise of Government* (Liberal Arts Press 1952), § 4-8 at 4-7 (hereinafter, *Locke*). Time and again Locke will return to his natural and inalienable trilogy of life, liberty and property. *See e.g.* § 131 at 73, § 136 at 77-78; § 137 at 78.

Men enter into civil government "for the natural preservation of their lives, liberties, and estates, which I call by the general name 'property.'" *Id.* § 123 at 71. Immediately Locke underscores this point.

> "The great and chief end, therefore, of men uniting into commonwealths and putting themselves under governments is the preservation of their property. To which in the state of nature there are many things wanting." *Id.* § 124.

Those things wanting are a known and settled law, administered by an indifferent judge, supported by the power to

effect its execution. Id. § 124-126. Government thus exists as a trade-off—the natural rights of freedom to act without hindrance within bounds of natural law, and freedom to punish all violations of that law are surrendered in exchange for the civil rights of protection and security. *Id.* § 128-131 at 72-73. Locke is careful to point out that in entering this contract, man does not sacrifice his property interests to the state in exchange for protection from their private deprivations: "for no rational creature can be supposed to change his condition with an intention to be worse . . ." *Id.* § 131, see also § 138 at 79.

For Locke therefore, government has a two-fold obligation. First, affirmatively, to protect the property of the citizenry from private invasion. Second, negatively to refrain from invading that self-same property. Thus, the 4th Amendment. The first obligation inherent to the very nature of government, and being in large a state function, the amendment simply states the second obligation. To Locke, and within our constitutional framework, the protection, whether from private or public invasion, speaks to the single sphere of life, liberty and estate.

The duty of protection is the seat of one's reciprocal obligations to the government. Police protection costs money. Therefore, "it is fit everyone who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it." *Id.* § 140 at 80. Whenever government either acts to exercise absolute power over the citizenry, or stands by and allows others to attempt to do so,

> ". . . by this breach of trust they forfeit the power the people had put into their hands . . . and it devolves to the people, who have a right to resume their original liberty and . . . provide for their own safety and security, which is the end for which they are in society." *Id.* § 222 at 124.

This necessarily follows from the principle that the people,

> ". . . will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society." *Id.* § 149 at 85.

The Declaration of Independence is simply a restatement of the above principles, and the consequent Revolution an actualization of their perceived dictates.

Locke's theory of government received affirmation in the two outstanding legal writers of the time, Coke and Blackstone. Coke, of course, preceded Locke, so that the influence may have run forward from Coke, but to the generation of the Revolution exposure would be contemporaneous.

"Lord Coke [was] widely recognized by the American colonists as the greatest authority of his time on the laws of England . . ." *Payton v. New York* 445 US 573, 593-94 (1980). His *Reports* and *Institutes of the Laws of England* were "avidly studied and reverentially cited" by generations of lawyers and judges on both sides of the Atlantic into the 19th Century. S. White, Sir Edward Coke and "The Grievances of the Commonwealth", 1621-1628 at 11 (1979). Jefferson, Hamilton, Madison, John and Samuel Adams, Patrick Henry, James Otis and Joseph Story are among those who were versed in Coke's writings. A. Willing, *Protection By Law Enforcement: The Emerging Constitutional Right* 35 Rutgers Law Rev. 1 (1982), (hereinafter, *Willing*).[3]

Coke reported, and participated in, *Calvin's Case* 7 Co. Rep. 1a, 77 Eng. Rep. 377 (All Judges of England Assembled 1608). The reciprocal obligations of sovereign and subject gained expression in that case.

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[3]See also *Schwartz, supra* 55-57; *Wood, supra* 453-463. Both discuss Coke's impact upon opposition to writs of assistance and the Stamp Act, as well as his influence on the genesis of the doctrine of judicial review.

> "But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects . . . ." *Id.* at 382.

This remains a "fundamental principle" of the British Constitution. T.F.T. Plucknett, *Taswell-Langmead's English Constitutional History* 338 (11th Ed. 1960). Coke, like Locke, felt that:

> *"In primus interest reipublicae, ut pax in regno conservetur, & quaecung; paci adversentur, provide declinentur* [it is the primary interest of the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it]: Which maxime hath been repeated and affirmed by authority of Parliament." 2 E. Coke, *Institutes of the Laws of England* at 158, emphasis in original.

Hence, the law abhors situations where offenses go unpunished. Id; see also *Vaux's Case*, 4 Co. Rep. 44a, 76 Eng. Rep. 992 (K. B. 1591). For "[w]hosoever violates laws does not hurt certain citizens but goes about to overthrow the whole commonwealth. . . ." Coke addressing the House of Commons, in 4 Commons Debates 1628, 124 (R. Johnson, M. Keeler, M. Cole, and W. Bidwell, Eds. 1978).

Ultimately it was Blackstone who set forth the contents of the English Common Law, after Coke, the Glorious Revolution and Locke had made their impact upon it. Blackstone's *Commentaries on the Laws of England* were published in four parts between 1765 and 1769 and quickly found their way to the colonies. The first colonial printing of the *Commentaries* occurred in 1771-1772. *Willing, supra* 1 Rutgers Law Rev. at 34. It has been persuasively argued that Blackstone's objective was not to challenge the law, but to inculcate a general awareness of the rights and duties of Englishmen found in the Common Law. D. Boor-

stin, *The Mysterious Science of the Law* (1941) at 3-30, 109-119, 187-191. His widespread effect upon the colonists and framers has been noted on various occasions by members of the Court. *See e.g. Payton v. New York* 445 US 373, 600 (1980) (White, J. dissenting). "The inclusion of Blackstone on this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights." Between 1925 and 1981 Blackstone was cited in 212 decisions of this Court. *Willing, supra* 1 Rutgers Law Review at 38.[4]

Locke's *Second Treatise* was published in 1690. By the time Blackstone wrote the *Commentaries,* some seventy-five years later, the Lockean interpretation of the Glorious Revolution had been fully assimilated into the law. Thus, beyond any specific references to Locke, his principles of government echo throughout the *Commentaries.* Thus Blackstone found there to be three principle rights: personal security, personal liberty and private property. This is simply a restatement of Locke's trilogy of natural rights, life, liberty and property, for the preservation of which man enters civil society. *Locke, supra* §§ 123-128 at 129-130. Locke of course spoke to the origin of civil government; Blackstone is instead describing the rights of British subjects under the constitution. Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Press (1979)) 120-135. These rights carry with them necessary subordinate rights, including the right to apply to the courts for redress of their infringement, since without a means of redressing violations, rights are without substance. This right Blackstone traces to the Magna Carta by way of Coke. *Id.* at 137.

The political or civil liberties of Englishmen exist in the entitlement to the regular administration of courts of justice, a right to petition King and Parliament when re-

[4]Coke has been cited in more than 70 decisions. *Id.*

dress is not obtained in the courts, and the ultimate right of armed self-defense when all else fails. These exist only to give substance to the three principal rights and are the direct end and purpose of the British Constitution. *Id.* at 140. Blackstone also wrote that government was founded upon compact, though to him the process is more implicit than to *Locke*. *Id.* at 47; *Locke, supra* § 13 at 9-10, §§ 128-130 at 72-73. Fears for the continued enjoyment and preservation of man's natural rights underlie the compact; thus the primary justification for civil government is the protection and security of those rights. 1 *Commentaries, supra,* 47-48; *Locke, supra* § 136 at 77-78.

Because of this, the same concept of reciprocity of obligation found in Coke and Locke finds expression in the *Commentaries*. Government is a contract, or a bargained exchange. On the one hand, the citizen accepts necessary limitations on his absolute natural rights. In return, government promises to protect the citizens' basic rights to life, liberty and property. Without the consideration of protection, the contract collapses. 1 *Commentaries* 74; *Locke, supra* § 97 at 55, § 222 at 123-124. Regardless of what occurs, in a state of nature or civil government, "[i]n all states and conditions, the true remedy of force without authority is to oppose it." *Locke, supra* § 155 at 88. To hold otherwise would be to violate the primary and inalienable law of nature—self-defense. 1 *Commentaries, supra,* 4.

Following these principles, the exercise of the police powers carried out in the administration of criminal justice quickly comes to the fore in the ranking of governmental obligations. There are two sorts of wrong, private, and public or criminal. The elevation of the status of the latter over the former flows from the fact that public injuries stop not with the generally incident private harm but repercuss to the community as a whole. 3 *Commentaries, supra* 2. This is due to the fact that such wrongs violate moral, or natural, as well as political rights; almost invariably involve a breach of the peace; and by example and

evil tendency threaten and endanger subversion of the whole society. They strike at the very core of governmental responsibility, undercutting its legitimacy. 4 *Commentaries, supra* at 177. Society quite simply cannot continue in existence if ". . . actions of this sort are suffered to escape with impunity." *Id.* at 5.[5]

Nor is Blackstone ignorant of the rationale that will later support the 4th Amendment. In discussing the crime of burglary that rationale is found, albeit implicitly and in a nascent state. He describes the seriousness of burglary (a capital offense at the time) as consisting in its invasion of the elemental rights to security and privacy in one's habitation. "And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." This extended to the civil process powers of the state, though not at that time to the criminal process. 4 *Commentaries, supra* at 223. The reasonability and warrant requirements of the 4th Amendment speak to one side of a single liberty. The crime of burglary, universally found in the United States, speaks to the other. That liberty is simply the right to security and privacy, a right which will countenance neither private, nor "unreasonable" public, invasion, be it of houses, persons, papers or effects.[6]

The reverse of this principle is that, in guarding against public invasions of these liberties, it makes no sense, and is in fact a dereliction to *unnecessarily* hinder their protection from private invasions. Rules regarding the exclusion of evidence which are overbroad i.e. insufficiently grounded in logic and experience to achieve their stated purpose, work precisely such a sacrifice.

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[5]In this and subsequent quotations, I have taken the liberty of modernizing Blackstone's use of the letters s and f.

[6]Once persons, papers and effects are included, one must look for correlation not to burglary alone, but to other crimes as well. For example, larceny, robbery, kidnapping.

B. American Colonists Claimed the Protection of these English Rights and Liberties

The colonists, upon arriving in America, immediately set out to secure to themselves the rights, liberties, franchises, immunities and privileges due English subjects. The First Charter of Virginia (1606) stated that all settlers and their posterity "... shall have and enjoy all Liberties, Franchises and Immunities, ..., as if they had been abiding and born, within this our Realm of *England* ..." R. Perry, *Sources of Our Liberties* (Amer. Bar. Found. 1952) 44 (hereinafter cited as *Sources*). This claim of entitlement was voiced time and time again, throughout the colonies, up to the time of Independence. See e.g. *The Charter of Mass. Bay* (1629), *Sources, supra* 83, 93; *The Charter of Maryland* (1632), *id.* 108-109; *Maryland Act For The Liberties of the People* (1639), *id.* 151; *The Charter of Rhode Island* (1663), *id.* 169, 177; *The Resolutions of the Stamp Act Congress* (1765), *id.* 270; *Declarations and Resolves of the First Cont. Cong.* (1774), *id.* 287. There can be no doubt that at least by 1774, if not by 1765, the rights and privileges were precisely those set forth by Blackstone, whose writings furnished enhanced support in the colonies for the principles enunciated by Locke.[7]

Locke's theory of compact and natural law found further reinforcement in the theological/political theories independently imported with the Puritans. In the Mayflower Compact (1620) the title itself suggests a notion of social compact. Within the body of the compact, the Puritans expressly "covenant" to form a civil body politic to better

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[7]For example, a pamphlet published in Maryland in 1722 protesting the Proprietor's denial of these rights specifically referred to Locke. *Sources, supra* 103. The Resolutions of the Stamp Act Congress contrasted, by placement in the first two sections, the duty of allegiance and the rights and privileges of English subjects, indicating familiarity with the concept of reciprocity traced back to Coke, *supra*.

order and preserve their existence in the New World. *Id.* at 69. This religiously based compact theory found acceptance beyond its Puritan adherents, and after a period of partial secularization ". . . emerges from the political literature as a major source of ideas and attitudes of the Revolutionary generation . . . ." *Bailyn, supra* 32. See, for example, John Winthrop contrasting natural absolute liberty, and the dangers of the natural state, with civil society. J. Winthrop, A Little Speech on Liberty (1643), *Brown, supra*, 22-23. The American Revolution was not only a philosophical revolution, which proceeded on the basis of long thought and discussion as to nature of man and government. It was a Revolution which could proceed based on an amazing unanimity of thought.

> "It seemed indeed to be a peculiar moment in history when all knowledge coincided, when classical antiquity, Christian theology, English empiricism, and European rationalism could all be linked. Thus Josiah Quincy, like other Americans, could without any sense of incongruity cite Rousseau, Plutarch, Blackstone and a seventeenth century Puritan all on the same page. *Wood, supra* 7, footnote omitted.

The principles fired in this crucible remain significant not simply as historical data, but continue to shape the self-understanding of the American polity. A review of contemporary state constitutions will present repeated reference to natural and inalienable rights, the protective purpose of government, the sovereignty of the people, their right to reform or abolish government when its protective purpose is not met, the social compact, and the reciprocal obligations of protection and allegiance between government and citizen.[8]

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[8]See e.g. Ariz. Const. Art. II, § 2, "all political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." This was written in 1912. In 1974 the citizens of

One of the most influential of pre-Revolutionary documents was the Pennsylvania Frame of Government of 1682. Therein, the need for government is premised on the depravity of mar (see Federalist Papers Nos. 6, 10, 15 and 51) and establishes a twofold basis of government: to "terrify evil doers" and to "cherish those that do well," *Sources, supra* 209-210. This entails a two part obligation: *To support power in reverence with the people, and to secure the people from the abuse of power . . .* for liberty without obedience is confusion, and obedience without liberty is slavery." *Id.* at 211, emphasis in original. In this single statement lies the concept of government which would come to fruition in the state and Federal constitutions during the following one hundred plus years. The "American Constitution" evolved into a document which meets two fundamental purposes. First, it describes the powers granted by the people for security of their liberties. Second, it guarantees that the government will not itself trample those liberties. Since it is a dual protection of the same field of liberties, both sides are equally fundamental—neither can be allowed to take precedence over the other without imperiling the whole.

Examination of the two most significant state constitutions of the Revolutionary period illustrates this reality. The Constitution of Virginia was adopted in 1776 at the beginning of the period of highest ferment, and served as a model to six other states and Vermont in the drafting of

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California amended their Constitution to add the following to the Declaration of Rights: "Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and attaining safety, happiness and privacy." See also Const. of Conn. (1965) Art. I § 1, "social compact"; Const. of Ken. (1891) Bill of Rts. § 3, "social compact"; Const. of Ill. (1971) Preamble and Art. I § 1, government to secure health, safety, welfare, and natural rights; Const. of HI. (1978) Art I § 2, natural law and reciprocity of obligations; Const. of Montana (1972) Declaration of Rts, Art II, § 3 inalienable rights and reciprocal obligations.

their bills of rights. *Sources, supra,* 309. The Massachusetts Constitution was drafted fourteen years later. The intervening events provided data for reflection and the development of a fully mature model of constitutional government. "Framed by the people, the document states clearly the rights for which the people fought the Revolutionary War." *Id.* 371.[9]

The Virginia Declaration posits a compact theory of the state, based upon inalienable natural rights: "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." *Sources, supra* 311. The end of government is simply the "common benefit, protection and security of the people . . . ." *Id.* Inability or unwillingness to meet this end raises from potentiality the inalienable right to reform, alter or abolish the government. These provisions are contained in two of the nine sections which "state *fundamental* general principles of a free republic." *Schwartz, supra* 70, emphasis added. The fact two prominent Anti-

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[9]Regarding Virginia's Declaration of Rights it has been stated: "By 1776, a consensus had clearly developed in the former colonies on the fundamental rights the law should protect. In giving specific content to those rights, Mason gave expression to the shared thoughts of the day on individual rights: in doing so he was more the codifier than the transforming innovator." *Schwartz, supra* 70. Of signal importance was the *total* reliance on natural law theory, premised largely on Locke's Second Treatise. *Id.* 69-72.

The Massachusetts Constitution was rejected on the first ratification attempt in 1778, due in large part to the absence of a bill of rights. Such a declaration was perceived as valuable consideration for the restriction on natural rights accepted upon entry into a civil state. The Declaration of Rights drafted stands as a summary of fundamental rights at the close of the Revolutionary period. It was used as the basis for the recommendations for a Federal Bill of Rights by Massachusetts in 1788. Massachusetts was the first state to request such a bill as the price of ratification. *Id.* 81-83. This constitution has been characterized as the most consequential of the period. *Wood, supra* 568.

Federalists, George Mason and Patrick Henry, composed this document in cooperation with perhaps the greatest Federalist, and author of the Federal Bill of Rights, James Madison, underscores the universal acceptance of the fundamental nature of these rights.

Fourteen years later Massachusetts came to the same conclusion—the state must work to ensure safety and prosperity, through the guarantee of man's natural rights to enjoy and defend his life and liberty, and acquire, possess and protect property. Preamble and Art. I. *Sources, supra* 373-374. See also Art. VII for a restatement of governments duty to provide protection and safety. *Id.* 375. Massachusetts also guaranteed the right to redress for all persons suffering injury (Art. XI), the right to dissolve government when it fails of its purpose of "protection, safety, prosperity, and happiness" (Art. VII), and recognized the reciprocal obligations of state and citizen (Art. X). *Id.* 375-376. In addition, Massachusetts originated the reserve powers clause. Art. IV, *id.*

Both documents illustrate the fundamental, constitutional value of the rights addressed in the Declaration of Independence and the Preamble to the United States Constitution.[10] The balance of rights becomes clearer through analysis of these constitutions. Given the manner of recognition of the absolute fundamentality of the rights to security and protection, those interests cannot fairly be characterized in terms of social policy or desirable, but secondary goals, of government. They are its only legiti-

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[10]Accord; *Const. of Penn.* (1776)—end of government is to secure and protect natural rights; failure to do so allows citizens to dissolve the government; inalienable right to enjoy, protect and defend life, liberty and property; right to protection bears reciprocal obligations. *Id.* 329-330. *Delaware Decl. of Rts.* (1776) *id.* 338-339; *Const. of Maryland* (1776) *id.* 364-365; *Const. of N.H.* (1784) *id.* 382-384. All refer to the same purpose of government, and guarantee protection from private and public oppression. Moreover, all, explicitly or implicitly, reserve the police powers to the people.

mate purpose, and the balance must be kept true in rules of criminal procedure so as not to unnecessarily risk their denial by either state or private action.

II

THIS FUNDAMENTAL OBLIGATION IS RECOGNIZED BY THE BILL OF RIGHTS, AND RESERVED TO THE STATES AND THE PEOPLE, IN THE 10TH AMENDMENT

"While the Federalists gave us the Constitution . . . the legacy of the Anti-Federalists was the Bill of Rights." H. Storing, *What the Anti-Federalists Were For* (Univ. Chicago Press, 1981) (hereinafter, *Anti-Federalists*) 65. Thus, the concerns of the Anti-Federalists with regard to the necessity of a Bill of Rights provide guidance in analyzing the intent of various provisions thereof.

Despite their titular contrast, the Federalists and Anti-Federalists shared a broad common ground. The purpose of government was to regulate and protect the citizen's individual rights. An exchange was made in entering government whereby restrictions on natural rights are accepted in return for the secure and peaceful enjoyment of civil rights, and any constitutional scheme should be judged first and last from the perspective of the individual's interest in the preservation of life, liberty and property. *Id.* 5-11, 53. The dispute between these two parties focused on the best means to secure those ends.

For the Anti-Federalists, the continued, independent existence of the states was crucial. This insistence on

> ". . . the primacy of the states rested on their belief that there was an inherent connection between the states and the preservation of liberty, which is the end of legitimate government." *Id.* 15.

Robert Whitehill, in Pennsylvania, and Patrick Henry, in Virginia, stated fears that the proposed United States Constitution would annihilate the states' constitutions and with

them the people's liberties. *Id.* Luther Martin described the relation of the citizenry to their dual governments in the following manner:

> "[T]o [the states] they look up for the security of their lives, liberties and properties: to these they must look up—The federal govt. they formed, to defend the whole agst. foreign nations, in case of war, and to defend the lesser states agst. the ambition of the larger . . . ." *Id.*, footnote omitted.

The states possess "[t]he governments instituted to secure the rights spoken of by the Declaration of Independence . . . ." *Id.*

Although hindsight and one hundred ninety-four years of history have served to highlight federal authority, the Anti-Federalist preference for the state constitutions as the repository of the people's liberties was well grounded. During the Revolutionary period the drafting of those constitutions overshadowed every other event and demanded the attention of the best minds. Americans understood that they had a unique opportunity to start afresh in the formation of government, and given the vacuum of authority at the time, social compact theory attained existential validation. *Id.* 127-129; see also *Schwartz, supra* 53, 66.

Because the police powers were properly within the states' sphere of activity, and because the happiness of the citizenry depended on that power above all others, the Anti-Federalists desired a system of parallel governments. *Anti-Federalists, supra* 31-32, footnote omitted. This would require the explicit reservation of the authority of the states, for

> "[w]ithout an express declaration 'in favor of the legislative rights of the several states, by which their sovereignty over their citizens within the state should be secured,' the states would 'be preserved only during the pleasure of Congress.' " *Id.* 34-35, footnote omitted.

The Federalists argued that the respective spheres of authority enjoyed by the Federal and state governments were sufficiently delineated by the various declarations of rights in the state constitutions, and the common law. The Anti-Federalists countered that the new Constitution was an "original compact." As such, it

> ". . . is not dependent on any other book for an explanation, and contains no reference to any other book. All the defences of it, therefore, so far as they are drawn from the state constitutions, or from maxims of the common law, are foreign to the purpose" Agrippa, cited in *Anti-Federalists, supra* 66-67, footnote omitted.

The strength of the general powers allocated to the Federal government under the new Constitution required an explicit reservation of the powers retained by the states and the people. The 9th and 10th Amendments were, therefore, adopted with the specific purpose of guaranteeing the natural and civil rights of the citizens to safety, security and protection.

The importance of the 10th Amendment, with it's reservations of the police powers to the states, is illuminated upon review of the proposals for provisions in a Bill of Rights submitted by eight states. Only one recommendation appears in all eight formulations—that powers not delegated to the federal government be declared as the reserve of the states. *Schwartz, supra* 158. These proposals reflected "the consensus that had developed among Americans with regard to the fundamental rights that ought to be protected by any Bill of Rights worthy of the name." *Id.* 157. By comparison, religious freedom was proposed by six states, guarantees of free press and jury trial as well as restrictions on searches and seizures in five, bail, speedy public trial and cruel and unusual punishment provisions in four, and the guarantees to confrontation, notice, counsel and acknowledgement of rights retained by the people in three. *Id.* 157-158. In this light, the 10th Amend-

ment serves to provide the same balance as that seen in the state constitutions. The 1st, 3rd, 4th, 5th, 6th, 7th and 8th Amendments secure the people from governmental invasions of their liberties. The 10th, along with the 2nd and the 9th, speak to the right to be free from private invasions of those liberties. A single purpose for the Bill of Rights is arrived at by way of this analysis, justified rationally and historically. It is to keep the liberty of the people whole and inviolate, no matter what the character of the invasion. The continued validity of this historical concern is documented in the unceasing invocation of the principles of natural law and the social compact by the American electorate.[11]

A. The Court Has Recognized the Constitutional Grounding of this Fundamental Right

Roe v. Wade 410 US 113 (1973) speaks to the instant issue as an example of the balancing process which must occur when the fundamental state interest of providing protection and security is counter poised to a personal liberty interest.

Although concerned with abortion rights, as opposed to typical issues of criminal procedure, the contending forces

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[11]A majority of state constitutions continue to predicate the existence of government on its ability to beneficially protect society, and do so in their bills of rights. E.g. Ala. Art I §§ 1 & 2; Alas. Art. I. §§ 1 & 2; Ark. Art. II §§ 1 & 2; Ariz. Art. II § 2; Cal. Art. II § 1; Colo. Art. II §§ 1 & 2; Conn. Art. I § 2; Idaho Art. I § 1; Ill. Preamble, Art. I § 1; Ind. Art. I § 1; Iowa Art. I § 2; Kan., Bill of Rights § 1; Ken., Bill of Rights § 4; LA Art I § 1; Maine Art. 1 §§ 1 & 2; Maryland, Dec. of Rights, Arts. 1 & 6; Mass. Preamble, Dec. of Rights Arts. VII & X; Minn. Art I § 1, Miss. Art. 3 §§ 5 & 6; Mont. Art. II, §§ 1-3; Neb. Art I § 1; Nev. Art. I § 2; Ore. Art. I § 1; N.J. Art. I § 2; N.H., Bill of Rights Arts. 1-3; N.C. Art. I §§ 1-3; N.M. Art. II §§ 2-4; Ohio, Art. I § 2; Penn. Art. I § 2; Tenn. Art. I §§ 1 & 2; Utah Art. I § 2; Wis. Art. I § 1; Wy. Art. I § 1. Note the immediate recitation of this right in these declarations. It is a first principle of government. See also n.8 *supra*.

at work in *Roe* are remarkably similar to those instantly present. The challenged abortion law was enacted pursuant to Texas' police powers. The state's interest in producing reliable, probative evidence during criminal proceedings is similarly an act necessarily incident to giving meaningful reality to general police powers. The appellant was asserting a constitutional right to abortion, located in the Bill of Rights. In the instant matter, it is the 4th and 14th Amendments which are being invoked on behalf of a device intended to give effect to their dictates. Thus, exercise of the police powers is alleged to violate certain liberty interests in both cases.

The right to an abortion is grounded in the 14th Amendment's concept of personal liberty. *Id.* 153. The right is not absolute, however, but finds qualification in "important state interests." *Id.* 154. While the source of these interests is not explicitly stated, it's noted that to withstand scrutiny where "fundamental rights" are regulated, there must be a "compelling state interest." *Id.* 155. The analysis by the Court goes on to hold,

> ". . . a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point . . . , these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. *Id.* 154.

The balance is struck by assuring that the law be ". . . narrowly drawn to express only the legitimate state interests at stake." *Id.* 155.

With regard to the state interest in the mother's health, compulsion exists at the point where regulation *reasonably* relates to the preservation and protection of her health. *Id.* 162-163. For the fetus this point is gained at viability. From then forward abortion may be totally proscribed except at the cost of the health and safety of the mother's existent life. *Id.* 163-164.

Analogical application of this rationale is apparent. The exclusionary rule is not a constitutional right, but is meant to serve as a remedial deterrent. The state's interest in introducing evidence is incident to its constitutionally recognized and reserved power to provide for protection of life, liberty and property. As a compelling state interest it should be allowed to limit ancillary constitutional remedies when those remedies do not "reasonably relate" to their intended object. Use of the "strict scrutiny" scheme of review makes eminent good sense when what is at stake are two quasi-Constitutional rights.[12]

A blanket application of the exclusionary rule extends its reach beyond its justification of deterrence, sacrificing its reasonableness. Since this, in turn, unreasonably burdens a fundamental right, it cannot be allowed to stand. Thus a good faith exception works to most efficaciously "hold the balance true" (*Gates, supra* ....., 76 L Ed 2d at 550) with regard to "'the most basic function of any government': 'to provide for the security of the individual and of his property.'" *Id.* ....., 76 L Ed 2d at 547, citations omitted.

Our analysis finds support in two recent decisions by the Court. Chief Justice Burger, writing for the majority in *Morris v. Slappy* ..... US ....., 75 L Ed 2d 610, 621 (1983) stated that error which clearly impaired a constitutional right of a defendant could not be allowed. "But in the administration of criminal justice, courts may not ignore the concern of victims." The exclusionary rule is, of course, such an administrative rule.

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[12]The term quasi-constitutional is intended to refer to the fact that within the parameters of the present controversy, the exclusion or inclusion of evidence serves a remedial purpose with respect to certain constitutional guarantees. Exclusion is intended to remedy, through deterrence, rights recognized in the 4th and 14th Amendments. The inclusion of evidence is incident to the guarantee of protection and security afforded by the states, recognized and reserved thereto in the 10th Amendment .

Michigan v. Long ..... US ....., 103 S. Ct. 3469 lends implicit support to our contentions regarding the respective weight of the interests represented in the instant case. When the Court imposed the Federal Exclusionary Rule upon the states, by way of the 14th Amendment, it intervened in the states' criminal procedure. Once this was done a duty of care was assumed by the Court not to unnecessarily burden the reserved powers of the states, even if the burden is an indirect one flowing from a state court's misapplication of federally imposed standards. See *Long, supra* at .....; 103 S. Ct. at 3477, n.8. The same analysis which makes review of state court decisions excluding evidence under federal standards appropriate, militates in favor of the balancing of rights contained in a good faith exception i.e. those federal standards should not pose unreasonable obstacles to the states in the performance of their obligations. Accordingly, it is submitted that our Federal system, safeguarded by the 10th Amendment, mandates the institution of a good faith exception to the exclusionary rule.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeal should be reversed.

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Respectfully submitted,

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